1960

Daisy Rowley v. Milford City et al : Brief of Appellants

Utah Supreme Court

Sam Cline; Pugsley, Hayes, Rampton and Watkiss; Attorneys for Appellants;

In the Supreme Court of the State of Utah

DAISY ROWLEY,

Plaintiff, and Respondent,

vs.

MILFORD CITY, a Municipal Corporation of the State of Utah; R. L. KIZER as Mayor of Milford City; A. S. WHITTAKER, JOHN DAVIS, W. S. BOLTON, M. S. BOWN and J. N. WESTON, as City Councilmen of said Milford City; V. M. BURNS, as City Recorder of said Milford City; ELWOOD JEFFERSON and ALENE JEFFERSON, his wife; and MIKE L. BRIMBERRY and DOROTHY BRIMBERRY, his wife; FIRST DOE, SECOND DOE and THIRD DOE,

Defendants. and Appellants.

No. 9182

APPELLANTS' BRIEF

ON APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF UTAH, IN AND FOR IRON COUNTY

HON. WILL L. HOYT, *Judge*

SAM CLINE,
PUGSLEY, HAYES, RAMPTON AND WATKISS,
Attorneys for Appellants

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Defendants. and Appellants.

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STATEMENT OF THE CASE

This cause is before this Court as an intermediate appeal from an order made and entered in the above cause by the Fifth District Court of the State of Utah, in and for Beaver County, denying the motion of the de-

fendants praying for an order permitting them to serve and file their respective supplemental answers setting forth and pleading an additional affirmative defense to the cause of action set forth in plantiff's complaint, and which supplemental answers would allege occurrences and events which have happened since the date of the answers of said defendants.

STATEMENT OF FACTS

In this cause and on or about the 23rd day of January, 1959, a complaint was filed in the District Court of Beaver County, Utah, being Civil No. 2930 (Tr. 3 to 10), which alleged in addition to the residence of the plaintiff, the existence of Milford City as a municipal corporation and the official positions of the other defendants, in substance as follows:

(a) That on the 1st day of July, 1935, the city purchased and acquired for the use and benefit of the inhabitants thereof certain described lands, consisting of approximately five acres.

(b) That prior to March, 1939, the city dedicated the premises as a public park and playground called the South Park; and set the same apart as a public park and playground, and that down to the present time the land has been dedicated and used as such.

(c) That about the year 1939 the city held a special

bond election for the purpose of raising the sum of $3500.00 to improve the premises; that the taxpayers voted in favor of bonding the city; that $3500.00 was borrowed and used for such purposes; that representations were made to the U. S. Works Progress Administration that the lands were and had been so dedicated and used, and that such amount was used for the improvement of the lands.

(d) That at a purported special meeting of the city council at which the Mayor and four councilmen were present, but at which meeting Councilman Bolton was not present, a purported sale of *a portion* of said property was made to the defendants Jefferson and Brimberry for a consideration of $2500.00; that two of the councilmen voted in favor of such sale and two voted against it and that the Mayor cast his vote in favor of said sale. (The portion so sold consisted of a tract 225 feet by 75 feet, or 0.39 of an acre).

(e) That on the 27th day of December, 1958, the Mayor and City Recorder executed a quit-claim deed to the purchasers.

(f) That at a regular meeting of the Council held on Dec. 1st, 1958, the plaintiff and other citizens and taxpayers protested the sale, contending that they considered the sale illegal and void; that at such meeting the City Recorder was directed to notify the purchasers to hold up work on the property, and that the purchasers

have at all times since Dec. 2nd, 1958, had notice and knowledge that the legality of the sale was in question.

(g) Plaintiff alleged that the sale was illegal and void and the deed did not constitute a valid conveyance; that the special meeting held on Nov. 21, 1958, was not a legal meeting because no notice thereof was given to the councilman not present at the meeting; that the property had been and was dedicated as and used as a park and playground; that those voting for the sale abused their discretion in making the sale for a grossly inadequate consideration, and without soliciting for other offers or allowng other prospective bidders to make a bid, and that two councilmen were influenced "by consideration of their employment by one of said purported purchasers, or members of his immediate family to make said sale for a grossly inadequate consideration."

(h) That the property covered by the sale is needed by the city and its citizens for park purposes.

(i) That since Nov. 21, 1958, the purchasers have built certain structures upon the lands included in the deed, to-wit: motel units and buildings, which structures interfere with the use of the premises for park and parking purposes.

(j) That prayer asks that the city be adjudged the owner of the premises; that the sale be declared as illegal and void; and for a decree requiring the purchasers to remove all structures placed thereon by them.

The answer of the City and its officers (Tr. 11 to 15), admits the city's purchase of the five acre tract in 1935, and the bond election in 1939 for the purpose of raising funds to improve the same, but deny that the premises conveyed to Jefferson and Brimberry were included within or formed a part of the South Park; alleged that the special meeting was regularly called and conducted, and that the conveyance was in all respects regular and the deed was issued after the consideration of $2500.00 had been paid by purchasers.

The answer pleads affirmatively that from the time of the purchase of the five acre tract portions have been improved and used as a public park, portions were formally dedicated for use as public streets and that the greatest portion thereof has been and is devoted to a public use, but that small portions thereof, immediately after its acquisition by the city and at various intervals thereafter were by various city councils deemed unnecessary for public use, and not having been so dedicated, were disposed of to various individuals and organizations; that a portion of the premises conveyed to Jefferson and Brimberry was never a part of said five acre tract and was never used as a park or any other public use, and that a portion of the premises so conveyed had not for many years been used by the city as a park.

As a further defense it was alleged that the city council received an offer of $2500.00 in cash for the

premises conveyed; that the offer was carefully and thoroughly discussed and considered; that it was by a majority of the council present at the meeting deemed for the best interests of the city that the premises be sold and used by the purchaser for the purpose of making valuable improvements thereon, putting the premises on the tax rolls and bringing new and valuable business into the city; that it was considered by the council that a sufficient area remained for use as a park and that the area left, in connection with other large tracts of land used exclusively as public parks and improved by lawns, trees and other improvements was more than sufficient for the needs of the citizens; that the price of $2500.00 offered was a fair and equitable price and that the city was receiving full value therefor; that the plaintiff and others appeared before the council after such sale and objected to the sale for the reason it was claimed the special meeting was not regularly called and proper notice thereof given, and for the further reason it was claimed the city was legally obligated to advertise the property for sale or to submit such sale to bids or accept the highest bid.

The defendants Jefferson and Brimberry filed their answer (Tr. 16 to 20), admitting and denying allegations of the complaint and affirmatively pleading substantially as set forth in the city's answer and in addition thereto pleaded that immediately after the acceptance

of their offer they took possession of the premises and commenced making improvements thereon and made definite commitments for the purchase of materials to be used in the construction of a modern motel and auto court and obligated themselves for the payment of substantial sums for said materials; that between the acceptance of their offer and the time when they were served with summons in this cause they made valuable improvements upon the premises and expended substantial amounts of money for the same and thereafter and up to and including the time of filing their answer they had almost completed the building of a modern and valuable auto court and motel; that they were never advised by the city council that the sale of the premises would be considered as illegal or void; that the council had never attempted to rescind the sale or return the moneys paid for the premises.

Upon such pleadings this cause was tried before Judge Will L. Hoyt, Judge of the Fifth Judicial District, commencing October 22nd, 1959.

At the conclusion of the trial and during the oral argument presented to the trial court, the court indicated strongly that he considered the premises conveyed to Jefferson and Brimberry were a part of public grounds, and expressed the opinion that the council had no legal right to dispose of the property because Sec. 10-8-8 Utah Code Annotated, 1953, provides a city council may va-

cate public parks and grounds *by ordinance* and there was no proof that an ordinance vacating the premises in question had ever been enacted. The court then took the case under advisement.

On Nov. 2nd, 1959, and before the trial court announced a decision in the case, the Milford City Council duly and regularly passed its Ordinance No. 96 (Tr. 26 to 28), ordaining that portions of the five acre tract (called the Campbell Millsite) be declared to be vacated as any part or portion of any public park or public grounds of Milford, and from and after the effective date of the ordinance should no longer be open to the public as a public park or public grounds or be considered as a part thereof. Described in the ordinance was not only the premises theretofore conveyed to Jefferson and Brimberry, but also several other tracts theretofore conveyed to other individuals and organizations. A copy of the ordinance is attached as an exhibit to the proposed supplemental answers.

A day or two after the enactment of the above ordinance the defendant city and its officials, and the defendants Jefferson and Brimberry, prepared their separate supplemental answers alleging the following additional acts which took place and happened since the filing of the first answers, and which took place prior to any determination of said cause by the trial court and which acts constitute an additional affirmative defense

to the cause of action pleaded in plaintiff's complaint, to-wit:

(a) That on November 2nd, 1959, at a regular session of the Milford City Council, at which time were present the Mayor, all City Councilmen and City Recorder, the council by a majority vote approved and passed Ordinance No. 96, vacating portions of the premises within the said Campbell Millsite sometimes known as the South Park, and including the premises described in plaintiff's complaint;

(b) That the City Council at said meeting and after the approval and passage of said ordinance, ordered it published immediately; and that the ordinance was published in a newspaper of general circulation and published within Milford City in the issue of and on Nov. 5, 1959.

(c) That the said ordinance would, under the statutes of Utah become effective on the 30th day after its publication, to-wit: on the 6th day of December, 1959, unless the legal voters of Milford City should require such Ordinance No. 96 to be submitted to the voters thereof as required and provided by Title 20, Chapter 11, U.C.A. 1953, in which latter event the effective date of such ordinance would be stayed until the outcome of the election.

(d) That in the event the ordinance should become

effective on Dec. 6th, 1959, or by an affirmative vote in the event of a referendum, the vacation of the premises as a public park (should the court determine the premises have been and are a portion of a public park) will then be subject to the disposition thereof as theretofore made by said city council or subject to such disposition as the council might then determine or be required to make.

(e) The supplemental answers then prayed that the defendants be permitted to assert the above additional affirmative defense; that the trial of the cause be reopened and the defendants permitted to submit proof of the facts therein pleaded; and that further proceedings be stayed until such further hearing; and in the event upon such further hearing defendants have submitted good and sufficient proof of the facts so pleaded by them that further proceedings then be stayed until either the ordinance should become effective, or in case of a referendum and negative vote thereon said ordinance is not permitted to become effective (Tr. 29-40).

On Nov. 9th, 1959, a motion was then filed by the defendants, supported by an affidavit of the City Recorder reciting the passage and publication of said Ordinance, moving the court for an order permitting the defendants to file and serve their respective supplemental answers, a copy of which proposed supplemental answers were attached to the motion (Tr. 21 to 28); and on Nov.

30th, 1959, the trial court denied such motion (Tr. 41).

A petition for interlocutory appeal from said order was filed in accordance with and as provided by the Utah Rules of Civil Procedure; and which appeal was duly allowed and granted by order of this Court (Tr. 42).

STATEMENT OF POINTS

The trial court erred in denying the motion of the defendants praying for an order permitting them to serve and file their respective supplemental answers which set forth and pleaded an additional affirmative defense to the cause of action set forth in plaintiff's complaint.

ARGUMENT

Sec. 20-11-24, U.C.A. 1953, provides that referendum petitions against any ordinance, franchise or resolution passed by the governing body of a city or town shall be filed with the clerk or recorder within thirty days after the passage of such ordinance, resolution or franchise.

The time within which a referendum petition against Ordinance No. 96, vacating the premises in question, should be filed in order to submit the same to a vote, expired on Dec. 6th, 1959.

While not shown by the record on this appeal, it can be stated and certainly will not be disputed, that

neither plaintiff nor anyone else presented a petition to the City Recorder within such thirty day period (or thereafter) asking for a referendum, and therefore under Sec. 10-6-12, U.C.A. 1953, the ordinance became effective on that date.

There now exists a valid and subsisting ordinance vacating the premises which plaintiff contends in her complaint are a part of a public park. The supplemental answers of the defendants in addition to pleading the passage, approval and publication of the ordinance, prayed that the cause be reopened and the defendants be permitted to submit proof of such facts, and if upon a further hearing they have submitted good and sufficient proof of such facts, further proceedings then be stayed until the ordinance either should become effective or in the event of a referendum and negative vote thereon it is not permitted to become effective. If the ordidance became effective the city would then be in a position to convey the premises to the defendants Jefferson and Brimberry, and if done in a legal manner, that is, at a regular or legally called meeting and by the affirmative vote and action of a majority of the council, such action would overcome the trial court's indicated possible determination that the premises were a part of a public park and not subject to being vacated excepting by ordinance.

We do not overlook the fact that the complaint al-

leges the sale was made at an alleged special meeting and that such meeting was void. We do not overlook the fact the complaint alleges that two councilmen who voted for the sale were improperly influenced so to do. While appellants have denied these allegations the propositions become moot with the subsequent action of the council in enacting the ordinance vacating the premises at a regular and stated meeting and by a majority vote of the five councilmen. The trial court cannot know, without permitting the supplemental answers to be filed and a further hearing had upon the matters therein alleged that the same two councilmen who allegedly were improperly influenced were the same two councilmen who voted against the enactment of the ordinance, or whether improper influence would still be claimed concerning the councilmen who later voted in favor of the passage of the ordinance.

Moreover, if the supplemental answers were permitted to be filed and a further hearing held upon the issues therein raised, it can be said with certainty the proof at that time will show no referendum against the ordinance and that it has now become effective, and that the council within its discretion and with on undisputed right so to do, has either reconveyed the premises to the defendants Jefferson and Brimberry, or has a legal right so to do. Actually, practically all, if not all of the issues presented to the trial court at the trial would be moot.

We are not unmindful of the fact the respondent alleges in her complaint that the sale is illegal in that the consideration was grossly inadequate, and without either soliciting for other offers or allowing other prospective bidders to make a bid. Upon a further hearing and under subsequent action of the city council even those issues conceivably would not be in controversy, but if so, they present a legal problem as to whether a city council is required to advertise its intention to make a sale and solicit bids, or even to sell to the highest bidder. A determination of these questions is not before this Court upon this intermediate appeal.

The complaint prays for an order or decree, ordering and requiring the defendants Jefferson and Brimberry to *forthwith* remove all structures they have placed on the premises. The evidence at the trial shows improvements placed upon the premises costing and of the value of approximately $60,000.00. If the trial court should conclude and decree on the present pleadings and evidence that such relief should be granted plaintiff, the defendants could be required to comply therewith and demolish and remove such valuable improvements before a subsequent action pleading the facts now set forth in the supplemental answers could be brought to issue and tried.

There can be no question but that the facts pleaded in said supplemental answers embrace other and fur-

ther defenses which arose after the original answers were filed and since the trial of this cause, and which relate very definitely to the plaintiff's claim for relief.

Prior to the adoption of the present Utah Rules of Civil Procedure and for many years the Utah Code of Civil Procedure provided for the making of supplemental pleadings alleging facts material to the case and which have happened after the filing of the former pleading.

> *Sec.* 104-13-13 *U.C.A.* 1943, provided: Either party may be allowed to make a supplemental complaint, answer or reply, alleging facts material to the case, which have happened or have come to his knowledge after the filing of the former pleading.
>
> *Rule 15(d), Utah Rules of Civil Procedure,* now provides as follows: Upon motion of a party the Court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. If the court deems it advisable that the adverse party plead thereto, it shall so order, specifying the time therefor.

This rule is taken verbatim from *Rule 15(d)* of the Federal Rules:

> A supplemental answer should be allowed to be filed only when the matter to be set forth embraces other and further defenses which arose after the original answer was filed and which relate to the plaintiff's claim for relief stated in the

original complaint. *Sec. 455, page 945, Vol. 1, Barron and Holtzoff Federal Practice and Procedure.*

A supplemental pleading may not be served as a matter of course without leave of the Court. Whether permission to file it should be granted or refused is a matter resting in the sound discretion of the district court. In the exercise of such discretion the courts are inclined toward the liberal allowance of supplemental pleadings. *Page 947, supra.*

Complaint in contract action brought *prematurely,* before final payment thereunder was due, may be cured by supplemental complaint. *Bracken vs Dahle,* 68 Utah 486, 251 Pac. 16.

The amendment was made to conform to the evidence and a new issue was such as could conveniently and effectively be handled to settle an entire controversy in the furtherance of justice without injury to substantive rights. *Wells vs. Wells,* 2 Utah (2nd) 241, 272 Pac. (2nd) 167, at page 170.

The consent of the adverse party or leave of court must be had in order to file a supplemental pleading, and the granting or refusal of such leave is a matter largely within the discretion of the court. Such discretion is not arbitrary, but is judicial in character, and must be exercised reasonably, and not capriciously or wilfully; and on good cause shown, the court cannot refuse to allow a supplemental pleading without an abuse of its discretion. Altho leave to file a supplemental pleading may be refused where the new matter offered is clearly frivolous or inequitable in its nature or where the new matter sought to be introduced will be plainly inadmissible at the trial, it has been

held that it should be granted, almost as a matter of course, in the interest of justice and for the protection of the party's rights and that an application for such leave is granted almost as a matter of course where the other party cannot be injured or prejudiced thereby or where the facts occurring after the service of the original complaint entitle complainant to more extensive relief. *Sec. 328, pages 725-6, Vol. 71, CJS.*

In the absence of statutory provision to the contrary, a supplemental pleading may be allowed after judgment as well as before, and where circumstances warrant the opening of a decree or judgment, such pleading is necessary to present the new issues to be litigated. *Pages 726-7, 71 CJS.*

The proper method of pleading a fact material to the cause occurring after the filing of a former pleading by a party is by way of a supplemental pleading. The right to file a supplemental pleading is not as of right, but the application to file such a pleading is addressed to the discretion of the trial court. * * * The effect of the termination of this contract was material, but the method of incorporating it in the pleadings was irregular. *It would have been an abuse of discretion* if application had been made to file a supplemental complaint containing allegations of this fact, *to deny it.* (Italics ours). *Story Gold Dredging Co. vs. Wilson,* 76 Pac. (2nd) 73, at page 76.

It is an abuse of discretion to refuse leave to a defendant to set up by supplemental answer a bankruptcy discharge obtained subsequent to the commencement of the action as a bar to any personal judgment, where proper application is made therefor within a reasonable time. *Jensen vs .Dorr,* 116 Pac. 553.

In the case of *United States vs. L. D. Caulk* Company (U.S.D.C. - Delaware) 114 Fed. Supp. 939, the defendant sought leave under Federal Rule 15d to file a supplemental answer setting forth matters occurring subsequent to filing of the original answer and which, it was contended, would render moot the matters complained of in plaintiff's complaint. In permitting the supplemental answer to be filed, the Court said:

> 'In this way, prior to the actual determination of the liability of the defendant, such defendant will be given an opportunity to establish a basis for its contention that the subsequent allegedly purging action has made any original action moot. Without the supplemental answer, it is difficult to see how this question can be raised. The defendant should have the opportunity to present the question * * *.'

Based upon statutes, rules, and authorities above cited and upon all sound reason, we submit that the trial court abused its discretion in refusing to permit the filing of the supplemental answers containing allegations which, if proved, would (a) render moot almost every legal claim raised by plaintiff's complaint, (b) effectively dispose of the entire controversy, (c) prevent possible irreparable injury to the defendants, Jefferson and Brimberry, and (d) prevent a multiplicity of actions. Particularly is this true by reason of the fact that no prejudice could possibly result to any legitimate interest of the plaintiff by permitting the supplemental pleadings to be filed.

CONCLUSION

There is involved in the denial of the defendants' motion for leave to file the supplemental answers substantial rights of said defendants and which rights are materially affected because if the within cause proceeds to a decision and decree under the present pleadings and if it be held and decreed the plaintiff be awarded all of the relief prayed for, then a subsequent action will be required to stay the execution of such decree until the validity of said ordinance together with the rights of the defendants thereunder can be determined.

All of the defendants submit it is in the interest and furtherance of equity and justice that the action of the trial court in denying the motion for an order permitting them to serve and file their respective proposed supplemental answers be reversed.

Respectfully Submitted,

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